BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES A. JORDAN Claimant VS. **DOUBLE D'S FAMILY RESTAURANT** Respondent AND **FIRSTCOMP INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,040,846

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 2, 2008, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Michael C. Helbert, of Emporia, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of his employment with respondent. Respondent was ordered to furnish the names of three physicians for selection of one by claimant for treatment. Medical treatment was ordered paid by respondent, and respondent was further ordered to pay claimant temporary total disability benefits beginning June 24, 2008, until claimant is released.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 2, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant has filed a motion to dismiss this appeal, arguing that respondent did not provide a jurisdictional basis for its appeal. Claimant further requests that the appeal be dismissed for lack of prosecution, as respondent's brief was due but was not filed by or on

November 3, 2008. In the event this appeal is not dismissed, claimant contends that he sustained his burden of proving that he suffered an aggravation of a preexisting condition or reinjured an old injury while in the course of his employment with respondent.

Respondent argues that claimant's current condition was not the result of his employment but rather was the result of a preexisting medical condition. In response to claimant's arguments concerning jurisdiction, respondent asserts that the jurisdictional basis for this appeal was established in its brief, which was filed on November 12, 2008.

The issues for the Board's review are:

(1) Should this appeal be dismissed for lack of jurisdiction and/or lack of prosecution?

(2) If not, did claimant suffer an accidental injury that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent as a cook. On June 23, 2008, he was standing by the deep fryers when he turned to get to the deep freeze and his left ankle popped. He reported the injury to a coworker and to respondent's owner, Donald Duvall. Claimant said that Mr. Duvall questioned him when he noticed him limping, and he told him that his ankle had popped when he was in the kitchen. Claimant testified that Mr. Duvall suggested that he elevate his leg when he got home.

Claimant's condition worsened, and he sought treatment at the emergency room on June 24, 2008. At that time, he complained of left ankle pain, stating he had turned and the ankle had popped two weeks earlier and that it happened again the day before. An x-ray of claimant's left foot showed he had an old injury and suggested a possible reinjury. An x-ray of his left ankle also showed an old injury and suggested an acute refracture. He was placed in a splint, was sent home with crutches, and was told not to work.

The next day, claimant's wife told Mr. Duvall that claimant would be unable to work, and Mr. Duvall said he would find someone to replace him. Claimant testified that Mr. Duvall did not tell him to seek treatment from a particular doctor. Claimant returned to the emergency room on July 2, 2008, where his splint was rewrapped and he was discharged with a diagnosis of a fractured calcaneus. On July 14, 2008, claimant again went to the emergency room complaining of pain in his left foot.

The medical records of those visits do not indicate that claimant injured his foot while at work. However, claimant's wife testified that they told the emergency room personnel that claimant had suffered a workers' compensation injury. They were asked for a claim number, but Mrs. Jordan told the emergency room personnel they did not have

one. Mrs. Jordan also testified that the emergency room personnel gave her an off-work slip on June 24. The off-work slip was provided to Mr. Duvall, but she could not remember if she gave it to him or if claimant did.

Claimant has been unable to work since June 23, 2008. He acknowledges that he felt a small pop in his ankle two weeks before June 23, 2008. But he was able to work after that incident until June 23, 2008, when he turned at work and felt a pop.

Claimant testified that 29 years ago he suffered a crush injury to his left ankle and heel that required surgery. He was eventually released from medical treatment and had not suffered any other injuries to his left ankle or foot until June 23, 2008. He admitted that prior to June 23, 2008, he told Mr. Duvall that he had problems with his left foot from time to time.

Mr. Duvall testified that he, along with his wife, is the owner of respondent. He testified that prior to June 23, 2008, he noticed that claimant limped a lot at work, and claimant advised him about the previous injury to his left foot. Mr. Duvall saw claimant about 9 p.m. the evening of June 23, when the restaurant was closing, but he did not observe any problems claimant had with walking. He denied that claimant made any statement to him to the effect that he had injured his foot at work that day. Nor did claimant say anything about his ankle popping or hurting while he was working the next time he saw him. Mr. Duvall testified that at that time, claimant told him, "This is not on you."[1] Mr. Duvall also testified that he was never provided with an off-work slip by either claimant or claimant's wife.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing

[1] P.H. Trans. at 43.

> on the claim . . . . A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

In *Allen*,[2] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[3]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

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[2] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[3] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[4] K.S.A. 2007 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[8] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[9]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

Claimant moved for respondent's appeal to be dismissed for failure to timely state a jurisdictional basis for its appeal. Respondent's Application for Review by Board of Appeals filed October 17, 2008, reads in part: "The jurisdictional issues presented for appeal are as follows: 1. Whether claimant met with personal injury arising out of and in the course of his employment." Whether an injury arose out of and in the course of the employment is an issue that is deemed jurisdictional by K.S.A. 44-534a(a)(2). The filing of an application for review is all that is necessary to perfect an appeal to the Board.[12]

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[7] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[9] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[10] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2007 Supp. 44-555c(k).

[12] K.S.A. 44-534a(a)(2), K.S.A. 2007 Supp. 44-551(i)(2)(A) and K.S.A. 2007 Supp. 44-555c(a).

Respondent's failure to timely file a brief to the Board does not constitute a failure to prosecute its appeal. Claimant's motion to dismiss is denied.

At the preliminary hearing, claimant alleged injury by a "series of microtraumas culminating on or about June 23, 2008."[13] Respondent denied accidental injury arising out of and in the course of employment. No other issues were identified at the preliminary hearing. The ALJ found claimant was injured out of and in the course of his employment with respondent on June 23, 2008 "when he aggravated a previous condition."[14]

Claimant's job as a cook requires that he be on his feet. He must also lift, carry, twist and turn repeatedly throughout the day. It is not unrealistic to believe that claimant's job duties could aggravate his preexisting foot and ankle injuries. However, the record contains conflicting testimony. Claimant testified that he recovered from his original left ankle and foot injury that required surgery in 1979, some 29 years ago, and suggests that he was not limping until reinjuring his ankle at work on June 23. This would support claimant's testimony that soon afterwards on June 23, Mr. Duvall noticed claimant limping and asked claimant about why he was limping. Claimant said he reported his injury to Mr. Duvall at that time. Mr. Duvall, however, denies such a conversation occurred on June 23 and contends that claimant limped a lot at work before June 23. Furthermore, according to Mr. Duvall, claimant denied his injury was work related two days later after claimant had been to the hospital.

In support of Mr. Duvall's testimony are the medical records from Susan B. Allen Memorial Hospital, because they do not reflect that the injury was work related. The June 24, 2008, record only records that the ankle popped two weeks earlier and again the day before. In addition, when first claimant reported to the hospital emergency room at 10:42 p.m. on June 24, 2008, he described the pain as a 10 on a scale of 0 to 10 and "almost unbearable."[15] This seems inconsistent with an accident that occurred the day before. If claimant was in that amount of pain, he would have sought treatment sooner, if not immediately after his injury. When claimant returned to the emergency room on July 2, 2008, he again described his pain level as 10 out of 10 and "no better than last week."

Claimant's wife testified that she told the admissions clerk that the injury was under workers compensation but was told that without a claim number, there was nothing they could do about that. It is inconsistent that claimant's wife would report the injury as workers compensation related at the emergency room on June 24 but claimant would tell Mr. Duvall

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[13] P.H. Trans. at 3.

[14] ALJ Order (Oct. 2, 2008).

[15] P.H. Trans., Cl. Ex. 3 at 10.

the next day, "This is not on you."[16] She could not have been referring to the 1979 injury at IBP because she testified she did not know anything about that.

Finally, claimant testified that he told a coworker, Roy Stanford, about his accident and injury on June 23, 2008. Mr. Stanford did not testify, but Duvall says he spoke with Mr. Stanford and he denied any such conversation or knowledge of such an accident on June 23, 2008.

Claimant bears the burden of proof. Based on the record presented to date, this Board Member finds that claimant has failed to prove it is more probably true than not true that his foot injury is due to an accident or series of accidents that arose out of and in the course of his employment with respondent.

CONCLUSION

(1) Claimant's motion to dismiss this appeal for lack of jurisdiction and lack of prosecution is denied.

(2) Claimant has failed to prove that he suffered personal injury by accident that arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated October 2, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of December, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[16] P.H. Trans. at 43.